Court File No. CV-13-10383-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JAGUAR MINING INC.

Applicant

FACTUM OF THE APPLICANT
(Returnable February 6, 2014)

February 5, 2014

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Overview

1. Jaguar Mining Inc. ("**Jaguar**" or the "**Applicant**") commenced these proceedings under the *Companies' Creditors Arrangement Act* (the "**CCAA**") on December 23, 2013 in order to effect a recapitalization and refinancing transaction (the "**Recapitalization**") on an expedited basis to provide much-needed liquidity to allow the Jaguar Group[1] to continue its operations and to provide a stronger financial foundation for the Jaguar Group going forward.

2. As anticipated in the Orders made by this Court on December 23, 2013, the Applicant now seeks the Court's sanction of its Plan of Compromise and Arrangement dated December 23, 2013, as amended and restated on January 31, 2014 (and as may be further amended, restated, modified or supplemented from time to time in accordance with its terms, the "**Plan**") in order to complete this critical restructuring transaction.

[1]Any capitalized terms used but not defined herein shall have the meaning given to them in the Plan (as defined in paragraph 2 of this Factum).

3. The Recapitalization and the Plan have strong support from Jaguar's creditors and achieve the goals of resolving Jaguar's urgent liquidity and leverage concerns, preserving its going concern operations and avoiding liquidation.

4. The Plan is fair and reasonable and provides a considerably greater benefit to the Company's stakeholders than liquidation. The Plan has been approved by 100% of the Applicant's Affected Unsecured Creditors voting in person or by proxy on the Plan.

5. The Plan and its approval by this Court are supported by the Ad Hoc Committee and the Monitor.

6. For the reasons set out herein, the Applicant submits that the Plan should be sanctioned pursuant to Section 6 of the CCAA.

The Facts

Background

7. The facts are set out in detail in the Affidavit of David M. Petroff sworn on December 23, 2013 ("**Petroff Affidavit**") and the Affidavit of T. Douglas Willock sworn on February 2, 2014 ("**Willock Affidavit**"), each filed in this proceeding, together with the reports of FTI Consulting Canada Inc. in its capacity as the Monitor.

8. Jaguar is the public parent corporation of three subsidiaries that carry on active gold mining and exploration in Brazil. Jaguar itself does not carry on active gold mining operations.

9. As of September 30, 2013 Jaguar had an accumulated deficit of over $317 million and had recognized a net loss of over $82 million during the first three quarters of the 2013 fiscal year. The liquidation value of Jaguar's assets would likely be much

lower than the value of its outstanding debt.[2]

10. In May of 2012, Jaguar announced the implementation of a comprehensive restructuring and turnaround plan to improve costs and efficiency of its operations. Key elements of the plan included administrative cost reductions, improved safety, optimization of the workforce, converting to properly scaled mining methodology, advanced development and definition drilling, and putting the Paciência operations of one of its Brazilian subsidiaries on care and maintenance. The turnaround plan is producing positive results and is on its way to meeting cost and production targets.[3]

11. Despite these initiatives, Jaguar concluded that more fundamental changes would be required to meet Jaguar's financial needs. Specifically, Jaguar found that its existing capital structure was unsustainable and that operational changes alone could not fix its liquidity deficit.[4]

12. Jaguar engaged financial advisors in May 2013[5] to consider an appropriate recapitalization strategy to address Jaguar's debt issues and liquidity needs.[6]

13. With the assistance of its financial advisors, Jaguar analyzed the possibility of divesting certain of its assets in order to provide increased liquidity to sustain the company during a period of unfavourable gold prices and to allow continued investment to achieve cost reductions. However, Jaguar and its Board of Directors concluded that such a divestiture was not feasible at that time.[7]

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[2]Petroff Affidavit, para 42.
[3]Petroff Affidavit, paras 60-61.
[4]Petroff Affidavit, para 62.
[5]Canaccord Genuity was initially engaged on May 21, 2012 to review and advise on a potential sale of assets related to the Gurupi project, which mandate was subsequently consolidated with this comprehensive strategic review mandate.
[6]Petroff Affidavit, para 63.
[7]Petroff Affidavit, para 65.

14. Also as part of this process, Jaguar's financial advisors had discussions with several potential sources of third party financing, none of which were willing to provide financing in the amount, of the type or on the timeline required by Jaguar.[8]

15. Continued investment in the Jaguar Group's mines and exploration properties is needed. Capital investment is required to: (i) continue operations in the normal course; (ii) continue the care and maintenance of the Paciência mine; (iii) update mine plans and ensure appropriate mine development; and (iv) continue operational improvements. Further, if the Jaguar Group's operations are to be optimized, capital is also required to increase production at existing operating mines, invest in equipment, and to allow the company to obtain technical reports and commercial feasibility studies with respect to its development assets. Due to its current liquidity issues and cost-reduction efforts, the Jaguar Group's capital investments have been postponed.[9]

16. Jaguar has concluded that its existing capital structure is unsustainable and a comprehensive restructuring plan involving a debt-for-equity exchange and an investment of new money, as provided for in the Plan, is the best available alternative to address Jaguar's financial issues.[10]

17. On November 1, 2013, Jaguar announced that its Board of Directors had approved a term sheet outlining the terms of the Plan.

18. On November 13, 2013, Jaguar issued a press release announcing that it had entered into an agreement (the "**Support Agreement**") with certain holders of Jaguar's 4.5% Convertible Notes and 5.5% Convertible Notes (together with holders of Notes

[8]Petroff Affidavit, para 66.
[9]Petroff Affidavit, para 56.
[10]Petroff Affidavit, para 67.

that executed consent agreements to the Support Agreement, the "**Consenting Noteholders**") in support of the Plan.

19. During the period from November 13, 2013 until the commencement of these proceedings, Jaguar and the Consenting Noteholders finalized the terms of the Plan, which was filed with this Court on December 23, 2013.

20. Based on current gold prices, and without the new money that will be available upon implementation of the Plan, Jaguar is expected to exhaust its cash resources by the end of February. As a consequence, Jaguar faces an imminent liquidity crisis and must implement the Plan on an expedited basis.[11]

21. Absent approval of the Plan and an expedited implementation, Jaguar will not have sufficient liquidity to continue operations and liquidation would appear to be the likely remaining alternative. A liquidation would be detrimental to all stakeholders with an economic interest in Jaguar or the Jaguar Group as a whole, including its hundreds of employees.[12]

22. Jaguar's liquidation analysis shows that in a liquidation scenario unsecured creditors would suffer a significant shortfall and the existing shares of Jaguar would have no economic value. This liquidation analysis has been reviewed by Jaguar's financial advisor and the Monitor.[13]

The Plan

23. As discussed above, the Plan will address certain liabilities of the Applicant, provide a stronger financial foundation for the Jaguar Group going forward, and raise

[11]Willock Affidavit, paras 8, 9 and 32.
[12]Willock Affidavit, para 32.
[13]Monitor's Second Report,paras 101 – 104.

additional liquidity to allow the Jaguar Group to continue to work towards its operational and financial goals.

24. In general terms, the Plan contemplates:

(a) an exchange of $268.5 million in principal amount of 4.5% Convertible Notes and 5.5% Convertible Notes (collectively, the "**Notes**"), as well as other Allowed Affected Unsecured Claims against Jaguar, for equity;

(b) a reduction of total pro forma funded debt from $323 million as at September 30, 2013 to $54 million upon the implementation of the Plan;

(c) a reduction of projected annual cash interest payments by $13.1 million;

(d) an investment of approximately $50 million in new equity raised by way of a backstopped share offering to current holders of Notes, the net proceeds of which will be available for use in the Jaguar Group's operations (the "**Share Offering**"). The Share Offering is backstopped by certain holders of the Notes (the "**Backstop Parties**") pursuant to a backstop agreement (the "**Backstop Agreement**");

(e) the retention by existing shareholders (the "**Existing Shareholders**") of their existing shares (the "**Existing Shares**"), subject to the share consolidation contemplated by the Plan (the "**Share Consolidation**"), which will account for 0.9% of the common shares of Jaguar upon completion of the Share Consolidation and the Share Offering; and

(f) the cancellation of all other equity interests and all equity claims (as such term is defined in the CCAA) for no consideration.[14]

25. Under the Plan, new common shares of Jaguar (the "**New Common Shares**") will be issued in connection with the exchange of the Notes and any other Allowed Affected Unsecured Claims and the Share Offering. The holders of Notes and other Allowed Affected Unsecured Creditors will receive the following New Common Shares in exchange for their Allowed Affected Unsecured Claim:

(a) their pro rata share of 12.6% of New Common Shares of Jaguar, allocated based on their Allowed Affected Unsecured Claims;

(b) their pro rata share of an additional 4.5% of the New Common Shares for those holders of Notes who signed the Support Agreement, or a consent

[14]Willock Affidavit, para 33.

agreement thereto, as of November 26, 2013, allocated based on their Noteholder's Allowed Claims;

(c) their pro rata share of an additional 10% of the New Common Shares, for those holders of Notes who are Backstop Parties, allocated based on their Backstop Commitments;

(d) an additional approximately 8% of the New Common Shares, for those holders of Notes who participate in the Share Offering, allocated pro rata based upon their Accrued Interest Claims; and

(e) 64% of the New Common Shares will be issued to Participating Eligible Investors and Funding Backstop Parties who advance funds to purchase shares in the Share Offering.

26. All Affected Unsecured Claims against Jaguar, including the Notes, will be released and discharged.

27. The Rights, the Shareholder Rights Plan, all Existing Share Options, the Stock Option Plan, the DSU Plan, the RSU Plan and the SAR Plan and all Equity Claims against Jaguar will be released, discharged and cancelled for no consideration,[15] provided that, as discussed above, Existing Shareholders shall retain their Existing Shares, subject to the Share Consolidation.

28. The Plan provides for releases in favour of: (i) the Applicant, the Subsidiaries, certain other associated parties and advisors to the Applicant, the Monitor and the Monitor's counsel (the "**Released Parties**"); (ii) the Noteholders and certain associated parties and advisors to the Noteholders (the "**Noteholder Released Parties**"); and (iii) prescribed current and former directors and officers of the Applicant (the "**Named Directors and Officers**"). The Plan also provides for the release of Director/Officer Indemnity Claims.

29. Jaguar believes that the releases contained in the Plan are all rationally connected to the Plan, given, among other things, the Subsidiaries are the operating

[15] The RSU Plan in respect of subsidiaries of Jaguar will be terminated and dealt with in a manner agreed to between the Applicant, the subsidiaries of Jaguar and the Majority Consenting Noteholders.

entities of the Jaguar Group and are the entities in which most of the Jaguar Group's value resides; directors and officers have overseen the Applicant's strategic review process and provided guidance and stability throughout the restructuring process; the advisors have been retained in a role specifically to assist with the development and implementation of the Plan, which could not be successfully achieved without these parties; and the Noteholders have agreed to compromise their claims and contributed to the development of, and supported, the Recapitalization and the Plan.[16]

30. The Plan does not release: (i) any party from its obligations in connection with the Plan; (ii) any party from fraud or wilful misconduct; or (iii) any claims that are Excluded Claims under the Plan, including any Agreed Excluded Litigation Claims and, in the case of directors and officers, any claims not permitted to be compromised under Section 5.1(2) of the CCAA.

31. The Plan contains certain injunctions against claims that correspond to the above releases and directs recovery for Section 5.1(2) Director/Officer Claims and Agreed Excluded Litigation Claims to insurance proceeds from applicable insurance policies. Accordingly, insurance policies will be the sole source of recovery for any Section 5.1(2) Director/Officer Claims and Agreed Excluded Litigation Claims.

32. The implementation of the Plan is conditional upon, among other things: (i) the listing of the New Common Shares of Jaguar on the TSX, the TSX Venture Exchange or another qualifying exchange under the Plan satisfactory to the Majority Consenting Noteholders without any vote or approval of the Existing Shareholders; and (ii) implementation of the Plan by February 28, 2014 (the "**Outside Date**").

[16]Willock Affidavit, para 38.

Amendments to the Plan

33. Amendments were made to the Plan prior to the Meeting and an amended and restated version of the Plan was presented at the Meeting[17] and posted on the Monitor's website as part of a Plan Supplement, all in accordance with the terms of the Plan. The Plan Supplement was delivered to the service list and filed with the Court.

34. Certain of the amendments to the Plan were of an administrative nature required to better give effect to the implementation of the Plan and/or to cure any errors, omissions or ambiguities and were not materially adverse to the financial or economic interests of the Affected Unsecured Creditors under the Plan.

35. Non-administrative amendments to the Plan primarily involved the creation of two new classes of Excluded Claims.

36. First, a claim of Canada Revenue Agency relating to certain non-material GST/HST amounts that Canada Revenue Agency currently asserts are unpaid and held in trust by Jaguar has been added to the definition of Excluded Claims.

37. Second, a category of Agreed Excluded Litigation Claims was also established, for which recoveries are limited solely to proceeds from applicable insurance policies. Identification of a claim as an Agreed Excluded Litigation Claim requires agreement by the Applicant and the Majority Consenting Noteholders.[18] As further described below, the Agreed Excluded Litigation Claims framework facilitated the implementation of a resolution of disputes regarding claims against the Applicant that could have otherwise hindered or delayed implementation of the Plan.

[17]Monitor's Third Report, at para. 49.
[18]Willock Affidavit, paras. 21-23.

38. The amendments to the Plan provide that nothing in the Plan will prejudice, compromise, release or otherwise affect any right or defence of any insured, or of any insurer under any insurance policy, in respect of an Agreed Excluded Litigation Claim or a Section 5.1(2) Director/Officer Claim.[19]

The Meeting

39. The Meeting Order granted by the Court on December 23, 2013 (the "**Meeting Order**") authorized and directed the Applicant to call and hold a meeting of Affected Unsecured Creditors (the "**Meeting**") to consider and vote on the Plan. After adjournments to allow for ongoing discussions about the Plan, the Meeting was called to order at the offices of Norton Rose Fulbright Canada LLP in Toronto on January 31, 2014 at 4:45 p.m.[20]

40. The information package to be provided to Affected Unsecured Creditors in connection with the Meeting was delivered in accordance with the terms of the Meeting Order.

41. A quorum, being at least one creditor with a Voting Claim appearing in person or by proxy, was present at the Meeting and the Meeting proceeded in accordance with the terms of the Meeting Order.

42. The vote on the amended and restated Plan, as presented at the Meeting, was approved by 100% of the creditors that voted, in person or by proxy. The aggregate dollar value of claims voted at the meeting was in excess of $225 million, representing over 80% of the class of affected creditors.[21]

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[19]Willock Affidavit, para 24.
[20]Monitor's Third Report, para 43.
[21]Monitor's Third Report, paras. 30 and 55; Willock Affidavit, para 31.

The Claims Procedure

43. On December 23, 2013, this Court granted a Claims Procedure Order (the "**Claims Procedure Order**") approving the proposed procedure for identifying and reviewing claims against Jaguar and its current and former directors and officers (the "**Claims Procedure**"). The Claims Procedure is being carried out in accordance with the Claims Procedure Order and with assistance from the Monitor.

44. The Claims Procedure Order established a claims bar date of January 22, 2014 (the "**Claims Bar Date**").

45. In accordance with the Claims Procedure Order:

(a) the Applicant delivered, within three business days of the date of the Claims Procedure Order, with copies to the Monitor and the Ad Hoc Committee, a notice stating the accrued amounts owing directly by the Applicant under the Notes;

(b) the Monitor published a Notice to Creditors in the Globe and Mail (National Edition) and The Wall Street Journal;

(c) the Monitor sent claims packages to applicable creditors;

(d) the Applicant reviewed all Proofs of Claim received by the Claims Bar Date with the assistance of the Monitor.

Aside from the Noteholders Allowed Claim in the aggregate amount of US$274.5 million (as at December 19, 2013) and US$274.9 million (as at December 31, 2013), fourteen other parties filed proofs of claims amounting, in aggregate, to less than CDN$1 million.[22]

46. At the current time, disputed claims of less than CDN$59,000 in aggregate remain unresolved.[23]

[22]Monitor's Third Report, paras 26.
[23]Monitor's Third Report, para. 26.

47. The Plan provides that New Common Shares that would be received by holders of disputed distribution claims if those disputed distribution claims were allowed will be held in a segregated account (the "**Disputed Distribution Claims Reserve**") until such time as such disputed distribution claims are resolved for distribution purposes.[24]

Articles of Reorganization

48. The Sanction Order proposes that the Court approve Articles of Reorganization pursuant to the *Business Corporations Act* (Ontario) in order to effect the Share Consolidation of the Existing Shares as contemplated by the Plan.

Agreed Excluded Litigation Claims

49. Litigation was commenced on March 27, 2012 by Daniel Titcomb, the former chief executive officer of Jaguar, and certain other associated parties (the "**2012 Litigation Plaintiffs**"), which lawsuit is currently proceeding in the United States Federal Court. This lawsuit alleges that these claims are worth in the tens of millions of dollars.

50. The lawsuit has been a continuing distraction for Jaguar and its Board of Directors, including those current directors who are defendants in this lawsuit. Jaguar believes that it is important to resolve this matter as part of this restructuring process.

51. At the comeback hearing in these proceedings on January 14, 2014, the 2012 Litigation Plaintiffs reserved their rights to argue that the claims of the 2012 Litigation Plaintiffs cannot be compromised by the Plan. Jaguar disagreed with this position.

[24]Plan, section 10.2.

52. As of the date of the Meeting, the matter was not resolved. On the date of the Meeting, Canadian counsel to the 2012 Litigation Plaintiffs filed a draft Notice of Motion with the Ontario Superior Court of Justice (Commercial List), which sought a variety of relief with respect to the Applicant and the Plan that, if granted, could have impeded the Applicant's restructuring process.[25]

53. As a result of further discussions following the Meeting, the Applicant and the 2012 Litigation Plaintiffs entered into an agreement to resolve matters with respect to the Plan.[26]

54. As part of that agreement, among other things, the claims of the 2012 Litigation Plaintiffs asserted in the United States District Court for the District Of New Hampshire bearing Civil Action No. 1:13-cv-00428-JL and limited related claims in limited circumstances will be Agreed Excluded Litigation Claims under the Plan.[27]

55. Certain other releases that are beneficial to the Applicant, its subsidiaries and its current and former directors and officers are also incorporated into the agreement. Nothing in the agreement will prejudice or affect any right or defence of any defendant or any applicable insurer in respect of an Agreed Excluded Litigation Claim[28]

56. This agreement allows Jaguar to move forward with the Plan without opposition from the 2012 Litigation Plaintiffs and without delay.[29]

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[25] Affidavit of T. Douglas Willock, sworn February 5, 2014 (the "**February 5 Affidavit**") at para. 6.
[26] February 5 Affidavit, at para. 7.
[27] February 5 Affidavit ,at para. 8.
[28] February 5 Affidavit ,at para. 8.
[29] February 5 Affidavit, at para. 9.

Monitor's Comments and Recommendation

57. In its Second Report, the Monitor provided the following comments and recommendations (among others):[30]

> The Monitor is satisfied that the Company, its Board of Directors and their financial and legal advisors have considered and pursued strategic alternatives available to the Company. They have determined that the Plan represents the best opportunity to provide a stronger foundation for the Jaguar Group to obtain additional liquidity and to remain a going concern thereby preserving operations for many of its stakeholders, including the Noteholders, lenders, employees, customers and suppliers.
>
> Nothing has come to the attention of the Monitor that would suggest that the Company has not been in compliance with the terms of the Initial Order, the Claims Procedure Order, the Meeting Order and/or the CCAA generally.
>
> ...
>
> It appears that the likely alternative to the Plan would be an expedited liquidation. The Monitor notes that an expedited liquidation could have an adverse effect on the Company and its stakeholders such that the recoveries under a liquidation scenario could result in less value to the stakeholders than what is contemplated under the Plan, except with respect to holders of Equity Claims as they do not receive any recoveries in respect of such claims under the Plan or in a liquidation scenario.
>
> If the Plan is approved by this Honourable Court, it will allow the Company to emerge from the CCAA Proceedings with a capital structure with significantly less debt and additional liquidity to continue to operate as a going concern.
>
> In consideration of all of the factors described herein, the Monitor recommends that the Meeting proceed in accordance with the terms of the Meeting Order and that Affected Unsecured Creditors vote in favour of the resolution to approve the Plan. It is the Monitor's view that the Plan is fair and reasonable, including the fact that the Plan provides for no recoveries to holders of Equity Claims.

58. In its Third Report, the Monitor stated as follows:

> The Monitor outlined the details of the Plan, reported on liquidation or bankruptcy alternatives should the Plan not be approved and implemented and provided its view on the

[30]Monitor's Second Report, paras 107-112.

> fairness and reasonableness of the Plan in the Monitor's Second Report. In this Monitor's Third Report, the Monitor has outlined the details of the Amended and Restated Plan. Based on all of the factors more particularly described in the Monitor's Second Report and herein, on balance, the Monitor holds the view that:
>
> (a) it appears that the likely alternative to the Amended and Restated Plan would be an expedited liquidation, which could have an adverse effect on the Company and its stakeholders such that the recoveries under a liquidation scenario could result in less value to the stakeholders than what is contemplated under the Amended and Restated Plan (except with respect to holders of Equity Claims as they do not receive any recoveries in respect of such claims under the Amended and Restated Plan or in a liquidation scenario); and
>
> (b) the Amended and Restated Plan is fair and reasonable, including the fact that the Amended and Restated Plan provides for no recoveries to holders of Equity Claims.
>
> ...
>
> It is the Monitor's view that the Company continues to act with due diligence and in good faith and has not breached any requirements under the CCAA or any Order of the Court. The Monitor is also of the view that the Amended and Restated Plan is fair and reasonable and recommends that the Amended and Restated Plan be sanctioned.[31]

The Issues and the Law

59. The Applicant submits that the proposed Sanction Order raises one primary question: should the Court approve the Plan?

60. In the context of the Plan, certain ancillary questions also arise regarding:

(a) the classification of creditors voting on the Plan;

(b) the early consent consideration provided under the Plan;

(c) the consideration provided to the Backstop Parties under the Plan;

(d) the treatment of Equity Claims under the Plan;

(e) the releases and injunctions provided in the Plan; and

(f) amendments to the Plan.

[31] Monitor's Third Report, paras. 69 and 74.

Sanction of Plan

61. Pursuant to section 6(1) of the CCAA, the Court has the jurisdiction to sanction a plan of compromise or arrangement where the requisite double majority of creditors has approved the Plan. The effect of the Court's approval is to bind the company and its creditors.

62. The Court, in deciding whether to sanction a plan, is to consider three factors according to existing jurisprudence:

(a) has there been strict compliance with all statutory requirements?

(b) has anything been done or purported to be done that is not authorized by the CCAA?;

(c) is the plan fair and reasonable?[32]

Strict Compliance With Statutory Requirements

63. The Applicant has complied, and will continue to comply, with all statutory requirements and with all orders made in these proceedings, including the Initial Order, the Claims Procedure Order and the Meeting Order, and to undertake the restructuring process in full compliance with the provisions of the CCAA:

(a) the Applicant is a debtor company to which the CCAA applies as confirmed by the granting of the Initial Order in these proceedings and the endorsement of Morawetz R.S.J. released on January 16, 2014;

(b) all meeting and claim materials were delivered to appropriate parties in accordance with the timelines established by the Court;

(c) the Meeting was duly convened and conducted in accordance with the Meeting Order on January 31, 2014; and

(d) notice of the Sanction Hearing was properly provided to interested parties.

[32] *Re Canwest Global Communications* (2010), 70 C.B.R. (5th) 1 at para. 14 (Ont. S.C.J.).

64. The Plan provides for the payment of Crown Claims and Employee Priority Claims in accordance with subsections 6(3) and 6(5) of the CCAA.

65. Further, in accordance with subsection 6(8) of the CCAA, the Plan does not provide for any payments in respect of Equity Claims.

All Steps Authorized By The CCAA

66. Nothing has been done that is not authorized by the CCAA. In proceeding toward sanction of the Plan, the Applicant has carried out the steps contemplated in detail in the Meeting Order and the Claims Procedure Order.

67. The Monitor, who has been actively involved in the CCAA Proceedings, believes that the Applicant continues to pursue the Plan with due diligence and in good faith and has not identified any instances of non-compliance with the Initial Order, the Claims Procedure Order, the Meeting Order or the CCAA, generally.

Fairness And Reasonableness

68. The question of fairness and reasonableness has been refined into the following analyses:

> Does [the] plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.[33]
>
> Turning to the fairness and reasonableness of a CCAA Plan requirement, its assessment requires the Court to consider the relative degrees of prejudice that would flow from granting or refusing the relief sought. To that end, in reviewing the fairness and reasonableness of a given plan, the Court does not and should not require perfection.[34]

[33] *Canwest Global Communications (Re)* (2010), 70 C.B.R. (5th) 1 at para. 19 (Ont. S.C.J.).
[34] *AbitibiBowater Inc. (Arrangement realtif à)* (2010), 72 C.B.R. (5th) 80 at para 33 (QCSC)

69. In connection with the above general analyses, a number of factors have been established to evaluate the fairness and reasonableness of a particular plan under the CCAA. Those factors include the following:

(a) whether claims were properly classified and the level of support received for the Plan;

(b) what creditors and shareholders would have received on bankruptcy or liquidation as compared to the Plan;

(c) whether the rights of creditors have been oppressed;

(d) whether the Plan, if implemented, will allow the Applicants' business to continue as a going concern;

(e) whether the Monitor is of the view that the Plan is advantageous to the affected creditors, is fair and reasonable and recommends its sanction;

(f) other available alternatives to the Plan or a bankruptcy; and

(g) the public interest.[35]

70. In the current circumstances the foregoing factors all point to the appropriateness of sanctioning the Plan.

(a) The Plan has the overwhelming support of 100% of Affected Unsecured Creditors who voted upon the Plan. The Meeting Order, which included the classification of the Applicant's Affected Unsecured Creditors into a single class, was approved by this Court. For the reasons described further below, this classification was appropriate.

(b) In a bankruptcy or liquidation, the Applicant's analysis (which was reviewed by its financial advisor and the Monitor) shows that shareholders would obtain no recoveries and Affected Unsecured Creditors would receive minimal recoveries that are expected to be less than those recoveries that are proposed under the Plan.

(c) No creditors' rights have been oppressed. Creditors have been dealt with fairly and transparently both during the CCAA proceeding and in the period leading up to the commencement of the CCAA proceeding.

[35] *Canwest Global Communications (Re)* (2010), 70 C.B.R. (5th) 1 at para. 21 and 31 (Ont. S.C.J.), *Canadian Red Cross Society (Re)* (2000), 19 C.B.R. (4th) 158 at para. 28 (Ont. S.C.J.), *Vicwest Corp. (Re)* (2003), 125 A.C.W.S. (3d) 761 at para 18 (Ont. S.C.J.).

(d) The Plan appears to be the best going concern solution and, absent implementation of the Plan, a shut down and liquidation is a significant risk.

(e) The Monitor is of the view that the Plan is fair and reasonable and recommended that Affected Unsecured Creditors vote in favour of the Plan.

(f) Other than the proposed Plan, no available alternative that would preserve any value for shareholders appears to exist.

(g) The Plan provides a going concern alternative for the Jaguar Group for the benefit of their stakeholders, including continued employment for the Jaguar Group's hundreds of employees in regions of Brazil that are highly dependent upon the mining industry.

71. The Plan is the best, and appears to be the only, available option to: (i) provide the liquidity needed for the Applicant to meet its obligations as they become due; (ii) provide the Applicant and its Subsidiaries with sufficient runway to emerge from the current downturn in the gold market; (iii) allow the Applicant to make necessary capital expenditures to maintain its operations; and (iv) de-leverage the Applicant's balance sheet to provide a sustainable capital structure.

Business Judgment Of The Applicant And Its Creditors

72. The terms of a plan of compromise and arrangement, and its acceptance, should largely be left to the applicant company and its creditors:

> The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction...the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.[36]

[36] *Re Stelco Inc.* (2005), 78 O.R. (3d) 254 (Ont. C.A.) at para. 26, citing *Re Stelco Inc.* (2005), 75 O.R. (3d) 5 at para. 44.

73. The jurisprudence is clear: judges supervising a restructuring proceeding, should be "very hesitant to second-guess the business decisions of directors and management".[37]

74. Similarly, the court should defer to creditors' support of a Plan. As explained by Justice Pepall: "the case law is replete with references to the need to respect business judgment...and that the Court will not second guess business decisions reached."[38] Strong creditor support for the Plan creates an inference of fairness and reasonableness.[39]

75. Once the Plan has been drafted and voted upon, the Court should not take steps to unilaterally amend significant terms of a Plan that have been approved by creditors.[40]

76. The Applicants have exercised their business judgment in composing the Plan through negotiation with key affected stakeholders, each with the benefit of sophisticated legal and financial advice. The Affected Unsecured Creditors have exercised their business judgment in providing overwhelming support for the Plan.

Classification of Creditors

77. The Applicant's approach to classification of the Affected Unsecured Creditors is appropriate in the circumstances and justified under the provisions of the CCAA. The Court approved that classification in the Meeting Order.

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[37] *Re Stelco Inc.* (2005), 75 O.R. (3d) 5 at para. 65 (Ont. C.A.).
[38] *Vicwest Corp. (Re)* (2003), 125 A.C.W.S. (3d) 761 at para. 19 (Ont. S.C.J.)
[39] *Olympia & York Developments Ltd. v. Royal Trust Co.* at Para. 36, and *Canadian Red Cross Society (Re)* (2000), 19 C.B.R. (4th) 158 at para. 25 (Ont. S.C.J.).
[40] *Re Pine Valley Mining Corp.* (2007) 35 C.B.R. (5th) 279 at paras. 18 and 19 (B.C.S.C.).

78. In accordance with Section 22 of the CCAA, Jaguar's Affected Unsecured Creditors were placed in a single class based upon their commonality of interests.[41]

79. The factors to be considered in determining whether creditors have a "commonality of interest" are:

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.[42]

80. By classifying the Affected Unsecured Creditors in a single voting class, the Applicant complied with the provisions of the CCAA:

(a) The creditors entitled to vote in this single class all hold unsecured claims against the Applicant that rank equally.

(b) In absence of approval of the Plan, each of these creditors would have the sole remedy of seeking to enforce its unsecured creditor right to payment; and

(c) in a bankruptcy or liquidation scenario each of these creditors would have the right to its pro rata share of the pool of assets available for distribution to unsecured creditors.

81. Creditors must be classified with the underlying purpose of the CCAA in mind – to facilitate successful restructurings. A fragmentation of classes that would render it excessively difficult to obtain approval of a CCAA plan would be contrary to the purpose of the CCAA and ought to be avoided.[43] The placement of all Affected Unsecured Creditors in a single class is appropriate in the current case not only based upon the factors in Section 22(2) of the CCAA, as described above, but also because this

[41] CCAA, s. 22(2).
[42] CCAA s. 22(2).
[43] *Atlantic Yarns Inc. (Re)*, 2008 NBQB 144 at paras. 52 and 55.

classification facilitates the restructuring process and does not lead to excessive fragmentation of classes.

82. Consistent with the CCAA and the terms of the Meeting Order, holders of "equity claims" were not permitted to vote at the Meeting.[44]

Early Consent Consideration

83. The Plan provides for the issuance of approximately 4.5% of the post-restructuring common equity of the Applicant (the "**Early Consent Shares**") to Consenting Noteholders who entered into the Support Agreement with the Applicant and the Subsidiaries in respect of the Plan, or a consent agreement thereto, as of November 26, 2013.

84. The provision of early consent consideration is an accepted practice in CCAA plans. The receipt of early consent consideration by some members of a voting class of creditors and not others has been approved by the Court where there is a rational purpose for the early consent consideration.[45]

85. In the current case, all holders of Notes were provided with an opportunity to share in the distribution of Early Consent Shares. The option to provide advance support for the restructuring and receive Early Consent Shares was announced publicly on November 13, 2013.

86. The advance support of the Applicant's restructuring was valuable as it provided a level of confidence that the proposed restructuring could be implemented and stability for the Jaguar Group's operations as the Applicant worked towards finalizing the Plan and towards implementation of the Recapitalization on the necessary expedited

[44]CCAA, s. 22.1.
[45]*Re Sino-Forest Corporation*, [2012] ONSC 7050 at para. 65-67 (Ont. S.C.J.).

timeline. Accordingly, there is a rational purpose in the circumstances for the Consenting Noteholders to receive the Early Consent Shares as additional consideration for the exchange of their Noteholder's Allowed Claims.

Backstop Commitment Shares

87. The Plan provides for the issuance of post-restructuring common equity of the Applicant (the "**Backstop Commitment Shares**") to those holders of Notes who (i) are Backstop Parties in respect of whom the Backstop Agreement has not been terminated; and (ii) who have complied with their obligations under the Backstop Agreement.

88. Like the Early Consent Shares, the provision of consideration such as the Backstop Commitment Shares is an accepted practice in CCAA plans.[46]

89. The backstop commitments obtained for the Share Offering from the Backstop Parties were essential to the Applicant's decision to move forward with the Plan. The new equity financing to be received under the Plan is critical to the continued viability of the Jaguar Group's business by allowing it to meet liquidity and capital investment needs. The Backstop Agreement provided the Applicant with the necessary assurance that the Share Offering would be subscribed for, subject to the terms and conditions of the Backstop Agreement, in order for it to proceed with the Recapitalization. Accordingly, it is reasonable in the circumstances for the Backstop Parties to receive the Backstop Commitment Shares as additional consideration for the exchange of their Noteholder's Allowed Claims.

[46] *AbitibiBowater Inc. (Arrangement relatif à)* (2010), Q.J. No. 6172 at para. 9 (QCSC).

Equity Claims

90. Pursuant to Subsection 6(8) of the CCAA, no compromise or arrangement that provides for the payment of an equity claim[47] is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

91. As discussed above, in accordance with subsection 6(8) of the CCAA, the Plan does not provide for any distributions to Existing Shareholders or in respect of any Equity Claims.

92. Under the Plan, Existing Shareholders will retain their Existing Shares, subject to the Share Consolidation. Upon completion of the Share Consolidation and the Share Offering, Existing Shareholders retain approximately 0.9% of the post-Recapitalization equity of Jaguar.

93. The retention of the Existing Shares by the Existing Shareholders will facilitate the satisfaction of certain requirements of the TSX Venture Exchange with respect to the minimum number of shareholders that a TSX Venture Exchange issuer must have. As noted above, the listing of Jaguar's shares on a qualifying exchange, such as the TSX Venture Exchange, is a condition to implementation of the Plan.

94. Retention of a limited portion of the common equity of Jaguar does not constitute a "payment" of an equity claim under the CCAA. This approach has been

[47]Subsection 2(1) of the CCAA defines an "equity claim" as a claim that is in respect of an equity interest, including a claim for, among other, things: (a) a dividend or similar payment, (b) a return of capital, (c) a redemption or retraction obligation, (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)

acceptable to CCAA courts in similar circumstances recently and is often necessary in the context of a public company restructuring process.[48]

Releases and Injunctions

95. The Plan provides for certain releases and injunctions in favour of Released Parties, Noteholder Released Parties and the Named Directors and Officers.

96. The Court has the jurisdiction to approve releases and injunctions for the benefit of third parties when sanctioning a CCAA plan. When exercising that jurisdiction, the Court should consider whether the proposed releases and injunctions are reasonably related to the proposed restructuring. The Ontario Court of Appeal has explained this analysis as follows:

> The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan.[49]

97. Factors indicating that there is such a reasonable connection are said to be:

(a) The parties released are necessary and essential to the restructuring of the debtor;

(b) The claims released are rationally related to the purpose of the Plan and necessary for it;

(c) The Plan cannot succeed without the releases;

(d) The Parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and

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[48] *In the Matter of A Plan of Compromise and Arrangement of Adanac Molybdenum Corporation* (Court File No. S088893), Sanction Order dated November 19, 2010 (B.C.S.C.).
[49] *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 at para. 70 (Ont. C.A.).

(e) The Plan will benefit not only the debtor companies but creditors generally.[50]

98. The above are not mandatory criteria and no individual factor is determinative of the issue of approval of a release.[51]

99. Each of the releases and injunctions contained in the Plan should be approved based upon the test described by the Court of Appeal and the above factors. The beneficiaries of the releases and injunctions are the Applicant, its advisors and certain associated parties, the Monitor and the Monitor's counsel, the Trustees and the Trustees' counsel, counsel to the Special Committee of the Applicant's Board of Directors, each of the Noteholders, the Ad Hoc Committee of Noteholders and the advisors to the Ad Hoc Committee of Noteholders, as well as specified current and former directors and officers of the Applicant. Each of these groups has made significant contributions to the restructuring of the Applicant and the releases and injunctions in favour of any of these parties are necessary and facilitate the successful completion of the Plan and the Recapitalization.

100. Full disclosure of the releases was made to creditors in the Plan, the Information Circular, the Monitor's Second Report and the affidavits of the Applicant filed in connection with the Meeting Order and this Plan sanction motion.

101. The unique aspects of each of the releases and injunctions are considered below.

Released Parties

102. The Released Parties include the Subsidiaries and parties that have provided services to the Applicant in connection with the restructuring (the "**Service Providers**").

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[50] *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 at para. 71 (Ont. C.A.).
[51] *Re Kitchener Frame Ltd. (2012)*, 86 C.B.R. (5th) 274 (Ont. S.C.J.) at para. 82;

The proposed releases in favour of both of these groups have a reasonable connection with the restructuring and satisfy the factors enumerated by the Court of Appeal.

103. The Subsidiaries and the Service Providers are all critical to the restructuring process. To the extent that any party's claim as against the Applicant is compromised under the Plan and such party then seeks to assert its claim against the operating Subsidiaries or the Service Providers, the purpose of the Plan would be undermined. In particular, the Subsidiaries are the operating entities of the Jaguar Group and are the entities in which most of the Jaguar Group's value resides. Further, the Service Providers have been retained in a role specifically to assist with the development and implementation of the Plan and the Plan could not have succeeded without these parties.

104. The Plan provides reasonable carve outs to these releases. The Released Parties will not be released for fraud or wilful misconduct and the Applicant and the Subsidiaries will not be released from their obligations in connection with the Plan or from any Excluded Claims.

Noteholder Released Parties

105. The Noteholder Released Parties include the Noteholders themselves as well as service providers to the Noteholders.

106. The releases are limited to matters that relate to either: (a) the Notes; (b) existing Equity Claims that are compromised under the Plan; or (c) the steps in the process of implementing the Plan. One of the primary goals of the Plan is to de-leverage the Applicant's balance sheet through the compromise of the Notes. It would be unreasonable to expect that a Noteholder would agree to compromise its claim

under the Notes in an effort to restructure the Applicant while at the same time remaining exposed to claims from third parties arising from the very transaction in which the Notes were compromised. These released claims are all rationally connected to the Plan and, as a result, these releases also meet the test established by the Court of Appeal.

107. The factors enumerated by the Court of Appeal are also satisfied in the case of the releases in favour of the Noteholder Released Parties. The Noteholders are key Affected Unsecured Creditors under the Plan and their advisors and the Trustees have been essential to the negotiation, development and approval process for the Plan. The releases are an important factor in the Noteholders' agreement to support the Plan, which cannot be implemented without the Noteholders' support. The Noteholders are contributing in a tangible and realistic way both through the compromise of their claims under the Notes and the provision of much needed liquidity through the Share Offering.

108. Similar to the releases in favour of the Released Parties, reasonable carve outs are provided for fraud or wilful misconduct or obligations in connection with the Plan.

Named Directors

109. As part of the negotiation of the Plan, the Named Directors and Officers to be released were determined. The Named Directors and Officers consist of all current and former directors and officers of the Applicant, except any current or former directors of the Applicant who are plaintiffs in the United States District Court for the New Hampshire Civil Action No. 1:13-cv-00428-JL or who have commenced any proceedings against the Applicant or any of its affiliates.

110. The releases of the Named Directors and Officers are rationally linked to the

restructuring. As explained by Justice Campbell in *Re Allen-Vanguard Corp.*,[52] there would be little if any incentive for directors to pursue a beneficial restructuring for a debtor company if those directors and officers knew that following the restructuring they would continue to be exposed to claims that were otherwise compromised against the debtor company. Further, director and officer indemnity claims against the company, as described in the Plan, are being released under the Plan, which is an important part of the restructuring of the Applicant to ensure that the Applicant does not continue to be exposed to any such claims following the restructuring.

111. The current directors and officers of the Applicant were necessary and essential to the restructuring process and have contributed in a tangible way to it. These directors and officers have overseen the Applicant's strategic review process and provided guidance and stability throughout the restructuring process.

112. As with the other releases contained in the Plan, the releases in favour of the Named Directors and Officers are subject to exceptions. Any Section 5.1(2) Director/Officer Claims and claims for fraud and wilful misconduct are not released.

Section 5.1(2) Director/Officer Claims

113. Subsection 5.1(2) of the CCAA states that a compromise or arrangement made in respect of a CCAA debtor company may not include a compromise of claims that (a) relate to contractual rights of one or more creditors; or (b) are based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors.

114. This subsection should be narrowly interpreted to deal specifically with claims of creditors. This Court has observed that "it would be inconsistent with the scheme of the

[52](2011), 81 C.B.R. (5th) 270

CCAA to allow all claims in which shareholders claim oppression to proceed against directors for acts or omissions that they did in the name of the company prior to the Initial Order."[53]

115. The Plan does not release or compromise any claims mentioned in Section 5.1(2) of the CCAA. The Plan preserves those claims and deals with them in a manner that has been accepted by this Court in past CCAA proceedings by directing recovery in respect of those claims to the proceeds of any applicable insurance policies.[54]

Amendments to the Plan

116. The Applicant complied with the terms of the Plan and the Meeting Order when amending the Plan on January 31, 2014. The details of the amendments were communicated to those present at the Meeting prior to any vote being taken. The Applicant provided notice to the service list regarding the amendments, and has filed a copy thereof with the Court. An electronic copy of the amended and restated version of the Plan is posted on the Monitor's website.

117. The Applicant received the consent of the Monitor and the Majority Consenting Noteholders to the amendments in accordance with the Plan.

118. The amended Plan was voted on and approved by Affected Unsecured Creditors at the Meeting.

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[53] *Re Allen-Vanguard Corp.* (2011), 81 C.B.R. (5th) 270 at para. 75. (Ont. S.C.J.).
[54] *In the Matter of A Plan of Compromise and Arrangement of Allen-Vanguard Corporation* (Court File No. CV-09-00008052-00CL), Sanction Order dated December 16, 2009 at para. 27 (Ont. S.C.J.), *In the Matter of a Plan of Compromise or Arrangement of Sino-Forest Corporation* (Court File No. CV-12-9667-00CL) dated December 10, 2012 (Ont. S.C.J.) at para. 37.

Articles of Reorganization

119. This court has jurisdiction to order that the Articles of Reorganization be filed in order to facilitate the consolidation of the Existing Shares that is a critical first step in the Plan, without a vote of the Existing Shareholders. This jurisdiction must be exercised in order to avoid an undesirable circumstance in which the Existing Shareholders, despite their lack of economic interest in Jaguar, would have a veto over this step in the Plan. A failure to implement this step in the Plan would lead to an unduly cumbersome capital structure and unworkable share price resulting from the number of shares that would otherwise have to be issued to create the equity ownership proportions contemplated by the Plan.[55]

Conclusions and Relief Requested

120. Throughout the course of the CCAA Proceedings, Jaguar has acted in good faith and with due diligence. The Company has complied with the requirements of the CCAA and the Orders of this Court.

121. Jaguar and its Board of Directors believe that the Plan is the best available alternative in the circumstances. Absent the Plan, liquidation would appear to be the likely remaining alternative, which would be detrimental to all stakeholders. The implementation of the Plan on an expedited basis is vital to Jaguar and its stakeholders.

122. The Plan was approved at the Meeting by all Affected Unsecured Creditors who voted on the Plan at the Meeting.

123. The Monitor believes that the Plan is fair and reasonable and satisfies the requirements of the CCAA, and recommends that the Plan be sanctioned.

[55]CCAA Section 6(2).

124. Accordingly, the Applicant requests that the Court grant the Sanction Order in the form presented so that the Applicant may move forward to complete the Recapitalization successfully and emerge from these CCAA Proceedings with a stronger financial foundation and new liquidity for Jaguar's operational and capital investment needs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

NORTON ROSE FULBRIGHT CANADA LLP

NORTON ROSE FULBRIGHT CANADA LLP
Lawyers For The Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

1	*Canwest Global Communications (Re)* (2010), 70 C.B.R. (5th) 1 (Ont. S.C.J.)
2	*AbitibiBowater Inc. (Arrangement realtif a)* (2010), 72. C.B.R. (5th) 80 (QCSC)
3	*Canadian Red Cross Society (Re)* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.)
4	*Vicwest Corp. (Re)* (2003), 125 A.C.W.S. (3d) 761 (Ont. S.C.J.)
5	*Re Stelco Inc.* (2005), 78 O.R. (3d) 254 (C.A.)
6	*Re Stelco Inc.* (2005), 75 O.R. (3d) 5 (Ont. C.A.).
7	*Olympia & York Developments Ltd. v. Royal Trust Co.*
8	*Re Pine Valley Mining Corp.* (2007) 35 C.B.R. (5th) 279 (B.C.S.C.)
9	*Atlantic Yarns Inc. (Re)*, 2008 NBQB 144
10	*Re Sino-Forest Corporation*, [2012] ONSC 7050 (Ont. S.C.J.)
11	*AbitibiBowater inc. (Arrangement relatif à)* (2010), Q.J. No. 6172 (Que. S.C.)
12	*In the Matter of A Plan of Compromise and Arrangement of Adanac Molybdenum Corporation* (Court File No. S088893), Sanction Order dated November 19, 2010 (B.C.S.C.).
13	*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (ON. C.A.)
14	*Re Kitchener Frame Ltd.* (2012), 86 C.B.R. (5th) 274 (Ont. S.C.J.)
15	*Re Allen-Vanguard Corp.* (2011) 81 C.B.R. (5th) 270 (Ont. S.C.J.)
16	*In the Matter of A Plan of Compromise and Arrangement of Allen-Vanguard Corporation* (Court File No. CV-09-00008052-00CL), Sanction Order dated December 16, 2009 (Ont. S.C.J.)
17	*In the Matter of a Plan of Compromise or Arrangement of Sino-Forest Corporation* (Court File No. CV-12-9667-00CL) dated December 10, 2012 (Ont. S.C.J.)

SCHEDULE "B"
RELEVANT STATUTES

Companies' Creditors Arrangement Act, R.S.C. 1985, CHAPTER C-36

Definitions

2. (1) In this Act,

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 122.

Compromises to be sanctioned by court

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the Income Tax Act;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada

Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

R.S., 1985, c. C-36, s. 6; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 123; 2004, c. 25, s. 194; 2005, c. 47, s. 126, 2007, c. 36, s. 106; 2009, c. 33, s. 27; 2012, c. 16, s. 82.

Company may establish classes

22. (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Factors

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

1997, c. 12, s. 126; 2005, c. 47, s. 131; 2007, c. 36, s. 71.

Class — creditors having equity claims

22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

2005, c. 47, s. 131; 2007, c. 36, s. 71.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JAGUAR MINING INC.

Applicant

Court File No: CV-13-10383-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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